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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ARISTA RECORDS, LLC., et al.,

Plaintiffs,

v.

Case No. SA05CA0372OG

DELINA TSCHIRHART,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DEFENDANT'S SECOND AMENDED ANSWER AND COUNTERCLAIM OR, IN THE ALTERNATIVE, TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES AND DISMISS DEFENDANT'S COUNTERCLAIMS

Plaintiffs respectfully submit this memorandum of law in support of their motion under Rules 8(a) and (c), 9(b), 12(b)(6), and 15(a) to strike Defendant's Second Amended Answer and Counterclaim or, in the alternative, to strike Defendant's affirmative defenses and dismiss Defendant's counterclaims.

INTRODUCTION

Plaintiffs filed their Complaint in April 2005 seeking redress for the infringement of their copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101 et seq. Defendant submitted an initial Answer on October 19, 2005 and a First Amended Answer and Jury Demand on November 30, 2005. Neither Defendant's initial Answer nor her First Amended Answer contained any affirmative defenses or counterclaims.

In February 2006, the parties discussed Defendant's intention to file numerous counterclaims, all of which challenge Plaintiffs' legitimate conduct in defending their copyrights and bringing this case against Defendant. At that time, Plaintiffs advised Defendant that her

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proposed counterclaims were without merit, that similar counterclaims have been consistently rejected by other courts, and that Defendant simply has many of her facts wrong. Defendant made no mention of any intention to assert affirmative defenses. Notwithstanding Plaintiffs' objections, on March 1, 2006, Defendant filed her Second Amended Answer and Counterclaims ("Second Amended Answer"). Defendant did so without seeking leave of Court or obtaining Plaintiffs' consent as required by Rule 15(a).

Defendant's Second Amended Answer accuses Plaintiffs of a laundry list of misbehavior and asserts seven separate counterclaims, including (1) libel and slander, (2) violation of Defendant's First Amendment right to privacy through alleged improper use of the Digital Millennium Copyright Act, 17 U.S.C. § 1201 et seq., (3) abuse of process, (4) electronic trespass, (5) violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, (6) fraud and misrepresentation, and (7) a declaratory judgment action that mirrors Plaintiffs' claims against Defendant. Defendant also included ten affirmative defenses not found in her previous answers.

As more fully explained below, Defendant's counterclaims are rife with inaccuracies, lack any legal or factual basis, and are simply an effort to manufacture issues that deflect attention from Defendant's own conduct. Defendant's counterclaims are purely strategic and have no substantive merit.

Because Defendant failed to seek leave of Court or obtain Plaintiffs' consent before filing her Second Amended Answer, Defendant's Second Amended Answer should be stricken. In the alternative, because Defendant failed to include her affirmative defenses in either her initial or First Amended Answer, and because Defendant's counterclaims fail to state claims upon which relief might be granted, Defendant's affirmative defenses should be stricken and her counterclaims dismissed.

BACKGROUND

Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the internet. On July 23, 2004, Plaintiffs' investigators detected an individual with the username "ugotburnedby21@fileshare" using the iMesh peer-to-peer file sharing program. This individual had 500 music files on her computer and was distributing them to the millions of persons who use the peer-to-peer networks. The investigators, a third party known as MediaSentry, determined that the individual used Internet Protocol ("IP") address 24.167.112.103 to connect to the internet.

After filing a "Doe" lawsuit against the individual using that IP address, Plaintiffs subpoenaed her internet service provider to determine her identity. The internet service provider—Time Warner Cable—identified Defendant Delina Tschirhart as the individual in question. On April 27, 2005, Plaintiffs filed their Complaint against Defendant for copyright infringement. As noted above, Defendant filed an initial Answer on October 19, 2005, a First Amended Answer and Jury Demand on November 30, 2005, and a Second Amended Answer and Counterclaim on March 1, 2006.

ARGUMENT

A. Defendant's Second Amended Answer should be stricken in its entirety because Defendant failed to seek leave to amend under Rule 15(a).

Once the initial pleadings have closed, a party may amend its pleadings only with leave of court or written consent of the adverse party. F.R.C.P. 15(a); Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 194 (5th Cir. 1985); Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666-67 (5th Cir. Unit A 1981); Perrian v. O'Grady, 958 F.2d 192, 193-94 (7th Cir. 1992). Here, Defendant neither sought leave of court nor obtained Plaintiffs' consent before filing her Amended Answer. For this reason alone, her Second Amended Answer should be stricken and her counterclaims dismissed. F.R.C.P. 15(a)

Moreover, the trial court may consider factors such as bad faith on the part of the movant and futility of the proposed amendments in deciding whether to grant a motion to amend. Addington, 650 F.2d at 666-67. "[I]f the complaint as amended would still be subject to dismissal, no abuse of discretion occurs when amendment is denied." Id. Here, as explained below, a request to amend by Defendant would be futile, because none of Defendant's counterclaims can survive a motion to dismiss.

B. In the alternative, Defendant's affirmative defenses should be stricken because Defendant failed to include her affirmative defenses in her initial answer as required by Rule 8(c) and can offer no justification for not raising these defenses before now.

Rule 8(c) requires that, when pleading to a preceding pleading "a party shall set forth affirmatively . . . estoppel . . . laches . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." F.R.C.P. 8(c). A defendant's failure to raise estoppel, laches, statute of limitations, and any other affirmative defense in responding to a complaint generally constitutes a waiver of that defense. United States use of Am. Bank v. C.I.T. Constr., Inc., 944 F.2d 253, 258 (5th Cir. 1991) (waiver of estoppel defense by failure to plead it); Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193, 198 (5th Cir. 1991) (defendant waived statute of limitation defense by failing to plead it); Trinity, 767 F.2d at 194 (5th Cir. 1985) (amendment adding affirmative defense denied because delay not justified).

This case has been pending for nearly one year. The parties have already served and responded to written discovery and are in the midst of depositions. Defendant filed her initial Answer in October 2005, approximately five months ago, and her First Amended Answer in December 2005, approximately three months ago. Neither Defendant's initial Answer nor her First Amended Answer contained any affirmative defenses. Now, for the first time, Defendant asserts a number of affirmative defenses including estoppel, laches, and statute of limitations. (Second Am. Answer ¶¶ 21-30.) Defendant should not be allowed to raise new affirmative defenses at this late stage of the proceedings. Defendant cites no new purported factual bases for these affirmative defenses and can show no justification for her failure to raise these defenses until now. This is apparently another strategy to unnecessarily complicate and prolong these proceedings. Because Defendant failed to raise her affirmative defenses in her initial Answer, and because she can show no justification for her delay, Defendant's affirmative defenses should be stricken.

C. In the event the Court declines to strike Defendant's Second Amended Answer in its entirety, Defendant's counterclaims should be dismissed because they fail to state claims upon which relief might be granted.

A motion to dismiss under Rule 12(b)(6) should be granted where it appears beyond doubt "that the [claimant] can prove no set of facts in support of [her] claim which would entitle [her] to relief." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995); see also Davis v. Bayless, Bayless & Stokes, 70 F.3d 367, 371 (5th Cir. 1995) (same). Although the district court must accept the well-pleaded factual allegations of the complaint as true, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993).

Courts in the Fifth Circuit routinely dismiss complaints for failure to state a claim upon which relief can be granted if an affirmative defense appears on the face of the pleading. Kansa Reins. Co., v. Congressional Mortgage Corp., 20 F.3d 1362, 1366 (5th Cir. 1994) (holding that "when a successful affirmative defense appears on the face of the pleadings, dismissal under Rule 12(b)(6) may be appropriate"); La Porte Constr. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1255 (5th Cir. 1986) (holding that "a complaint that shows relief to be barred by an affirmative defense, such as the statute of limitations, may be dismissed for failure to state a cause of action").

Applying these standards here, Defendant's counterclaims should be dismissed.

1. **Defendant's libel and slander claim should be dismissed because Defendant cannot establish the necessary elements of such a claim and because any action for defamation based on Plaintiffs' allegations of copyright infringement in this case is barred.**

To establish a cause of action for libel or slander in Texas requires proof that (1) the defendant published a statement of fact about the plaintiff; (2) the statement was false; (3) the statement damaged the plaintiff; and (4) the speaker was not privileged. Peshak v. Greer, 13 S.W.3d 421, 426 (Tex. App. 2000); Mars, Inc. v. Gonzalez, 71 S.W.3d 434, 437 (Tex. App. 2002); see also RESTATEMENT (SECOND) OF TORTS § 558 (1977). To hold corporate entities like Plaintiffs responsible for libel or slander, there must be evidence that someone acting in the course and scope of their duties for the corporation communicated a false statement to a non-employee or to an employee whose course and scope of duties for the corporation did not require receipt of the communication. Mars, Inc., 71 S.W.3d at 436-37.

a. **Defendant's libel and slander claim fails to state a claim upon which relief may be granted.**

The sole basis for Defendant's defamation claim in this case is a purported statement by Plaintiffs to the effect that Defendant infringed their copyrights. Specifically, Defendant alleges that Plaintiffs

> negligently, intentionally, and with actual malice published orally and, presumably, in writing to representatives of MediaSentry and others that [Defendant] had infringed their copyrights.

(Second Am. Answer ¶ 46.) This allegation fails to state a valid claim for defamation.

To begin with, Defendant has failed to provide Plaintiffs with fair notice of what her defamation claim actually is. She fails to allege who made the alleged statement, when, or in what context. This failure, and especially Defendant's cryptic allegation of a statement "presumably" made to "others," violates the federal notice pleading standard of Rule 8(a). See Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 387 (5th Cir. 2001) (affirming dismissal for failure to give fair notice of facts supporting legal conclusions in the complaint); Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 278 (5th Cir. 1990) (notice is "'touchstone" by which sufficiency of pleading is determined). Because Plaintiffs have not been provided with "fair notice" of Defendant's defamation claim, the claim should be dismissed.

In addition, Defendant has failed to plead special damages with the particularity required by Rule 9(b). Under Texas law, a statement is defamatory if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury, or to impeach any person's honesty, integrity, virtue, or reputation. See Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (2005). A statement is defamatory per se where the words are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable. Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc., No. 03-03-00631-CV, 2005 WL 1489681, at *2-3 (Tex. App. June 23, 2005) (citing Knox v. Taylor, 992 S.W.2d 40, 50 (Tex. App. 1999)). "The statement must be unambiguously defamatory per se on its face, either (1) alleging criminal conduct, or (2) injuring a person in his office, business, profession, or occupation." Id. (citing Knox, 992 S.W.2d at 50, Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. App. 1992)). The court decides as a matter of law whether a statement is defamatory per se. Id. at *3.

"The distinction between defamation and defamation per se is critical when it comes to the issue of damages." Id. (citing Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1331 (5th Cir. 1993) (applying Texas law)). In a defamation per se claim, damages are presumed, but where a statement is not defamatory per se, the plaintiff must plead special damages with particularity. Snead, 998 F.2d at 1331; Kelly, 832 S.W.2d at 91, 94; Action Repair, Inc. v. American Broad. Cos., 776 F.2d 143, 149-50 (7th Cir. 1985).

Here, the alleged statement that Defendant infringed Plaintiffs' copyrights does not unambiguously impute criminal conduct to Defendant or injure her in her office, business, profession, or occupation. Therefore, the alleged statement is not defamatory per se and Defendant must plead special damages with particularity. Texas Disposal Sys., 2005 WL 1489681, at *2-3; Kelly, 832 S.W.2d at 91, 94; Action Repair, 776 F.2d at 149-50. Defendant's counterclaim, however, contains only a conclusory allegation that Plaintiffs' alleged statement harmed her "reputation, impeached her honesty, and caused her humiliation for which she seeks actual damages in an amount not to exceed $1,000,000.00." (Second Am. Answer ¶ 46.) Defendant offers no specificity whatsoever to support these allegations. She fails to allege any facts to show how she was purportedly humiliated or suffered damage to her reputation by an alleged statement from Plaintiffs to their investigator. Because Defendant has failed to allege specific facts to support her purported damages, her defamation claim should be dismissed.

Moreover, a corporate entity cannot be held liable for defamation under Texas law absent proof that the communication at issue was sent on behalf of the corporation. Mars, Inc., 71 S.W.3d at 440 (reversing judgment in favor of plaintiff because there was no proof that the communication was sent on behalf of the corporation). Here, Defendant fails to allege any facts about the purported statement to MediaSentry that would impute liability to Plaintiffs. She fails to say which Plaintiff made the alleged statement, who specifically made the alleged statement, when the statement was supposedly made, or how it was made. Absent such allegations, Defendant cannot establish that Plaintiffs should be responsible for any purported statement.[1]

b. Defendant's libel and slander claim is also barred by federal and state law.

Absent any other supporting factual allegations, Plaintiffs must conclude from the language of Defendant's counterclaim that the publication of which Defendant complains relates to the filing of this lawsuit in federal court. Such an action, however, is barred by both the First Amendment Right to Petition and Texas law.

The First Amendment guarantees "the right of the people . . . to petition the Government for redress of grievances." U.S. CONST. amend. I. The Supreme Court has declared the right to petition to be "among the most precious rights of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). This right to petition—often referred to as Noerr-Pennington immunity—has been extended to afford a party the right to access the courts. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Consistent with this right, numerous courts have shielded litigants from claims relating to the filing of litigation. See, e.g., Video Int'l Prod., Inc. v. Warner-Amex Cable Comm., 858 F.2d 1075, 1082-83 (5th Cir. 1988); Chemicor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128-129 (3d. Cir. 1999); Havoco Am., Ltd. v. Hollobow, 702 F.2d 643, 649 (7th Cir. 1983).

The Noerr-Pennington doctrine "was originally promulgated to protect efforts to influence legislative or executive action from liability under the Sherman Act." Oregon Natural Resources Council v. MOHLA, 944 F.2d 531, 533 (9th Cir. 1991). The United States Supreme

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[1] Defendant also has her facts wrong. MeidaSentry collected evidence in this case and was the entity that first identified Defendant's IP address as the address used to connect to the internet and make Plaintiffs' songs available to the public. Thus, it was MediaSentry that advised Plaintiffs of Defendant's uploading and downloading, not the other way around as Defendant appears to contend.

Court has since extended the doctrine to protect the First Amendment right to petition the government, including the courts. See California Motor Transp., 404 U.S. at 510. "While the Noerr-Pennington doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts." White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000); see also Video Int'l Prod., 858 F.2d at 1084 ("There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."); Ford Motor Co. v. Money Makers Auto. Surplus, Inc., 2005 WL 2464715, at *4 (D. Neb. Sep. 14, 2005) ("[Plaintiff's] statements are privileged under the First Amendment via the Noerr-Pennington doctrine, which provides absolute immunity from any liability arising out of a party's filing and maintaining a civil lawsuit.").

Here, the only communication by Plaintiffs that could conceivably form the basis of a defamation claim by Defendant is the filing of the Complaint in this case. That action—the petitioning of courts for redress of a grievance—is protected by the First Amendment as explained through the Noerr-Pennington doctrine, and it cannot form the basis for Defendant's counterclaim. As a result, Defendant's libel and slander claim should be dismissed.

Separate from the Noerr-Pennington doctrine, Texas law provides an absolute privilege for statements made by parties in the course of judicial proceedings. James v. Brown, 637 S.W.2d 914, 916 (Tex. 1982). The privilege attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits, and any of the pleadings or other papers in the case. Id. at 916-17. The immunity afforded by this absolute privilege means that any statement made in the trial of any case cannot constitute the basis for a defamation action, regardless of the negligence or malice with which it is made. Bird v.

W.C.W., 868 S.W.2d 767, 771 (Tex. 1994); James, 637 S.W.2d at 916. For this reason, too, any defamation claim based on Plaintiffs' assertion of claims against Defendant in this case must fail.

2. Any claim by Defendant that Plaintiffs violated her constitutional right to privacy should be dismissed because Defendant has not set forth a proper claim and cannot establish any conceivable "privacy" claim against Plaintiffs.

Defendant next alleges "the improper use of § 512(h) of the Digital Millennium Copyright Act ("DMCA") violated Defendant's Constitutionally protected rights to privacy and to speak and to associate anonymously." (Second Am. Answer ¶ 47.) These allegations fail to state a cognizable claim for relief.

a. Defendant's allegations concerning the DMCA are baseless.

This Court may take judicial notice of the fact that no DMCA subpoena was used in this case. In fact, the DMCA played no role in this case whatsoever. As Defendant herself acknowledges (Second Am. Answer ¶¶ 41, 48), Plaintiffs learned Defendant's identity with a Rule 45 subpoena issued in a "Doe" lawsuit filed in the United States District Court for the Southern District of New York, Caroline Records, Inc. v. Does 1-100, Case No. 1:2004 CV 6875 (SHS). Attached as Exhibit A hereto is (1) a copy of the Caroline Records court's order granting Plaintiffs request for expedited discovery in the form of a Rule 45 subpoena to Time Warner, (2) the subpoena served on Time Warner, and (3) Time Warner's response identifying Defendant, all of which were provided to Defendant in the course of discovery in this case. This Court can take judicial notice under F.R.E. 201 of the Caroline Records court's order granting Plaintiffs request for expedited discovery, which order is also available on PACER (Docket Entry #8). See Lovelace v. Software Spectrum, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (courts may consider matters of which they may take judicial notice when ruling on a motion to dismiss); F.R.E. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). As demonstrated by Defendant's own allegations, therefore, it was through the Caroline Records Doe action, and not the DMCA, that Plaintiffs learned Defendant's identity. Thus, Defendant's allegations of a purported violation of the DMCA are without merit and should be dismissed.

b. Defendant cannot bring a First Amendment claim against non-governmental entities such as Plaintiffs.

To the extent Defendant may be attempting to assert some sort of violation of her First Amendment rights against Plaintiffs, such claim also fails entirely. Plaintiffs' conduct, as private entities, cannot be construed as state action that would permit a claim under the First Amendment. See Video Int'l Prod., 858 F.2d at 1084 ("In order for a private party to be liable [for a purported constitutional violation], it must have acted under color of state law.").

c. Any purported claim for invasion of privacy fails as a matter of law.

Moreover, any claim for invasion of privacy should be dismissed because Defendant has not pled, and could not prove, the elements of such a claim. "The elements of a cause of action for invasion of privacy by intrusion on seclusion are (1) the defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs, (2) the intrusion would be highly offensive to a reasonable person, and (3) the plaintiff suffered injury as a result of the defendant's intrusion." Clayton v. Wisener, 2005 Tex. App. LEXIS 4543, at *20 (Tex. App. June 15, 2005) (citing Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993)). The defendant must intrude on the plaintiff's private place or private matters. If the alleged intrusion involves a public place or public matters, there can be no liability. Floyd v. Park Cities People, Inc., 685 S.W.2d 96, 97-98 (Tex. App. 1985), overruled on other grounds, Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994).

Here, Defendant cannot show that Plaintiffs have intruded upon her "solitude or seclusion or private affairs or concerns" because the files detected by Plaintiffs' investigator were not maintained in a private manner. As a matter of law, no user of a peer-to-peer file sharing network can have a reasonable expectation of privacy for computer files maintained through that program. See, e.g., In re Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 257, 267 (D.D.C. 2003) (when an ISP subscriber "opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."), rev'd on other grounds, 351 F.3d 1229 (D.C. Cir. 2003); United States v. Kennedy, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (activation of file-sharing mechanism shows no expectation of privacy); Elektra Entm't Group, Inc. v. Does 1-9, 2004 WL 2095581, at *5 (S.D.N.Y. Sep. 8, 2004) (holding Defendant has "minimal 'expectation of privacy in downloading and distributing copyrighted songs without permission'").

Plaintiffs' investigators did not thrust themselves into Defendant's computer without invitation, permission, or welcome. On the contrary, Defendant's computer files in her iMesh program were open for the world to see. Plaintiffs cannot have committed any invasion of privacy in looking at those files. There was no seclusion or privacy to invade. To the extent Defendant seeks to bring a claim for invasion of privacy, then, her claim must fail.

3. Defendant's claim for abuse of process should be dismissed because Defendant has failed to plead the essential elements of the claim.

Defendant's counterclaim for abuse of legal process fares no better. In a thoroughly confusing series of contentions, Defendant alleges that Plaintiffs "secretly obtained process, a subpoena, against [Defendant] under the guise of a Jane Doe lawsuit" and then served that subpoena on Time Warner to learn Defendant's identify, "which was an act other than the lawfully intended purpose of [the DMCA]." (Second. Am. Answer ¶ 48.) These allegations fail to state a claim for abuse of process.[2]

"Abuse of process is the malicious use or misapplication of process in order to accomplish an ulterior purpose." Hunt v. Baldwin, 68 S.W.3d 117, 129 (Tex. App. 2001) (citing Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 378 (Tex. App. 1989)). To establish a claim for abuse of process, a plaintiff must allege and prove the following: (1) the plaintiff was served with valid process; (2) the defendant made an illegal, improper, or perverted use of the process, a use neither warranted nor authorized by the process; (3) the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of the process; and (4) damage to the plaintiff as a result of such illegal act. Id. (citing Bossin v. Towber, 894 S.W.2d 25, 33 (Tex. App. 1994)); Futerfas v. Park Towers, 707 S.W.2d 149,160 (Texas App. 1986).

Here, Defendant has not alleged, and could not prove, any of the first three elements. To begin with, a claim of abuse of process requires proof that the party bringing the claim was served with process in an underlying action. See Futerfas, 707 S.W.2d at 160-61 (no cause of action for abuse of process as a matter of law where the plaintiff had not been arrested, i.e., had not been served with process, in the underlying criminal proceeding). Defendant here does not allege, and could offer no set of facts to prove, that she was served with process by Plaintiffs in the Caroline Records Doe action or any other underlying action. The subpoena in the Doe action

[2] Defendant also complains that Plaintiffs did not notify her of the Caroline Records Doe action. (Second Am. Answer ¶ 48.) This allegation conveniently ignores the fact that Plaintiffs did not know Defendant's identity at the time of the Doe action and, therefore, could not possibly have notified Defendant. As Defendant herself knows full well, the purpose of the Doe action was to learn Defendant's identity. (Second Am. Answer ¶ 41.)

was served on Defendant's internet service provider, not Defendant. (Second Am. Answer ¶ 41.) For this reason alone Defendant's abuse of process claim should be dismissed.

As for the second element, "[i]t is critical to a cause of action for abuse of process that the process be improperly used after it has been issued." Bossin, 894 S.W.2d at 33. Here, Defendant makes no such allegation. Instead, she resorts to her facially and legally incorrect accusation that Plaintiffs served a subpoena on Defendant's internet service provider under the DMCA. (Second Am. Answer ¶ 48.) As explained above, and on the face of Defendant's own Second Amended Answer (Id. ¶¶ 41, 48), however, Plaintiffs issued their Rule 45 subpoena with the permission of the court in the Caroline Records Doe action. Thus, defendant has failed to properly allege any "illegal, improper, or perverted use" of process in this case. Fernandez-Montes, 987 F.2d at 284 (holding that conclusory allegations are insufficient to defeat a motion to dismiss for failure to state a claim); Blackburn, 42 F.3d at 931 (same).

Finally, Defendant fails to allege that Plaintiffs had any "ulterior motive or purpose" in issuing process in the Doe case. Quite the contrary, Defendant herself acknowledges that Plaintiffs used the Caroline Records Doe action and the subpoena to her internet service provider to learn Defendant's identity. (Second Am. Answer ¶ 41.) Plaintiffs then filed the current action to protect their copyright interests. Plaintiffs' motives were straightforward and proper, and Plaintiffs used the process for the very purpose it was intended. See Bossin, 894 S.W.2d at 33 (holding that process is properly used when it is used for the purpose for which it was intended). For all of these reasons, Defendant's claim of abuse of process should be dismissed.

4. Defendant's electronic trespass claim should be dismissed because Defendant has not, and could not, adequately plead the essential elements of the claim.

Defendant has named her fourth counterclaim "electronic trespass." (Second Am. Answer ¶ 49.) Although Plaintiffs have been unable to locate any Texas authority discussing, much less recognizing, any claim called "electronic trespass," it appears from Defendant's allegations that she alleges that Plaintiffs have committed a "trespass to chattel." Plaintiffs have committed no such trespass, and Defendant's counterclaim does not adequately plead such a claim in any event.

Under Texas law, "[a] trespass to chattels is a wrongful interference with or injury to property that causes actual damage to the property or deprives the owner of its use for a substantial period of time." Armstrong v. Benavides, 180 S.W.3d 359, 360 (Tex. App. 2005); see also RESTATEMENT (SECOND) OF TORTS § 218 ("One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest."); Pearl Investments, LLC v. Standard I/O, Inc., 257 F. Supp. 2d 326, 354 (D. Me. 2003) (granting summary judgment on trespass claim where there was no evidence that allegedly unauthorized access to computer network "impaired its condition, quality or value").

Here, there was no "wrongful interference." As explained above, Plaintiffs' investigators did not thrust themselves into Defendant's computer without invitation, permission, or welcome. On the contrary, the shared folder for Defendant's iMesh program was open for the world to see. Consent to enter may be established by conduct. General Mills Restaurants, Inc. v. Texas Wings, Inc., 12 S.W.3d 827, 835 (Tex. App. 2000). In this case, Plaintiffs cannot have committed any trespass in looking at the contents of Defendant's iMesh shared folder because Defendant invited the entire internet-using public to see those files. See, e.g., In re Verizon Internet Servs., Inc., 257 F. Supp. 2d at 267 (when an ISP subscriber "opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.").

Moreover, Defendant has made no allegation that Plaintiffs' actions disturbed her possession. She does not allege that the actions of which she complains have deprived her of the right to possess her computer files or her use thereof, and there is no suggestion that Defendant's computer files have been impaired, altered, or otherwise damaged. Neither does Defendant allege that Plaintiffs' actions have caused bodily or competitive harm to her or anything else in which she owns some legally protected interest. Indeed, she does not allege that Plaintiffs disturbed her possession of any personal property at all.

Instead, Defendant simply alleges that she has suffered damages, including "lost earnings and medical expenses." (Second Am. Answer ¶ 49.) These allegations are insufficient to suggest that Defendant's possession of the computer files at issue was ever disturbed or harmed. As a matter of law, no claim for trespass can lie against Plaintiffs in this action, and Plaintiffs ask the Court to dismiss this counterclaim.

5. **Defendant's claim that Plaintiffs have violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, should be dismissed because Defendant has not properly pled, and cannot establish, a civil claim under the Act.**

Defendant next alleges, again in conclusory fashion, that Plaintiffs "willfully used the computer in [Defendant's] home without authorization to appropriate property for their own purposes" in violation of the Computer Fraud and Abuse Act ("CFAA"). (Second Am. Answer ¶ 50.) These allegations fail to state a claim for relief.

a. Defendant has not alleged, and could not prove, a cause of action under the CFAA.

The Computer Fraud and Abuse Act ("CFAA") "is primarily a criminal statute, but it also creates a private cause of action in Section 1030(g)." Charles Schwab & Co., Inc. v. Carter, 2005 WL 351929, at *2 (N.D. Ill. Feb. 11, 2005). Section 1030(g) authorizes a civil cause of action only in limited circumstances. 18 U.S.C. § 1030(g). A civil action for a violation of the Act "may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B)." 18 U.S.C. § 1030(g). Subsection (a)(5)(B) requires proof of unauthorized access to a computer that causes:

> (i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $ 5,000 in value;
>
> (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
>
> (iii) physical injury to any person;
>
> (iv) a threat to public health or safety; or
>
> (v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;

18 U.S.C. § 1030(a)(5)(B)(i)-(v). Here, Defendant has not alleged, and could not prove, any of the above. Thus, her CFAA counterclaim should be dismissed.

b. As a matter of law, Defendant cannot establish that access to her iMesh shared folder was "unauthorized."

All of the activities prohibited by the CFAA require proof that access to another's computer was made without authorization. 18 U.S.C. § 1030(a)(5)(A); see also Theofel v. Farey-

Jones, 359 F.3d 1066, 1078 (9th Cir. 2004). Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their investigator acted without authorization.

As previously discussed, Plaintiffs' investigators were able to access Defendant's shared folder because the iMesh peer-to-peer software utilized by Defendant to swap files over the internet has a file-sharing feature that was enabled at the time the infringement was detected. This feature allows anyone else on the internet to access any files in the "shared folder" that the user distributes over the peer-to-peer networks. See Kennedy, 81 F. Supp. 2d at 1106 n.4 (explaining detection through file-sharing program). Defendant's action in enabling the file-sharing feature authorized the whole world to access her music files—making them as publicly accessible as any other web site on the internet. By making the "shared folder" available to the public, Defendant has granted exactly the type of authorization contemplated by the CFAA. See, e.g., International Ass'n of Machinists & Aerospace Workers v. Werner, 390 F. Supp. 2d 479 (D. Md. 2005) (dismissing claim under CFAA where defendant had authorization to access computer at issue); see also In re Verizon Internet Servs., 257 F. Supp. 2d at 267 (holding that when an internet user "opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."); Elektra Entm't Group, 2004 WL 2095581, at *5 (finding "minimal expectation of privacy" in sharing copyrighted songs on the internet without permission).

In short, Defendant's own actions effectively provided a blanket authorization for others to access the contents of her iMesh shared folder. As a result, no claim under the CFAA for unauthorized access to Defendant's computer is available to her and it should be dismissed.

6. Defendant's claim for fraud and misrepresentation should be dismissed because Defendant has failed to plead the claim with particularity, because

the claim is a manufactured effort to escape Defendant's written admission of infringement, and because any claim based on purported statements during settlement discussions is barred by the Noerr-Pennington doctrine.

a. Defendant's fraud claim should be dismissed because she has failed to plead the elements of such a claim with particularity as required by Rule 9(b).

Rule 9(b) requires that the circumstances constituting fraud must be stated with particularity. F.R.C.P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). The purposes of the pleading requirement are to protect a defending party's reputation from harm and to provide detailed notice of a fraud claim to a defending party. Guidry v. Bank of LaPlace, 954 F.2d 278, 288 (5th Cir. 1992) (affirming dismissal of fraud charges for failure to meet Rule 9(b)'s particularity requirement); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994) (noting that Rule 9(b)'s "heightened pleading standard" provides fair notice of a party's claims). The Rule also discourages meritless fraud accusations that can do serious damage to the goodwill of a business. Id. (Rule 9(b)'s higher pleading standard "stems from the obvious concerns that general, unsubstantiated charges of fraud can do damage to defendant's reputation."). At a minimum, Rule 9(b) requires a party to allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." Tuchman, 14 F.3d at 1068.

Here, Defendant's Second Amended Answer contains no specificity whatsoever. She simply alleges that Plaintiffs "knowingly made materially false representations and omissions of material facts to [Defendant] in an attempt to extort money from her," intended that Defendant "believe their false statements and rely on their false statements and omissions so that she would be frightened, intimidated, and coerced into paying them thousands of dollars," and that Plaintiffs' "false representations and omissions created an unreasonable risk that [Defendant] would rely upon them to her detriment." (Am. Answer ¶ 51.) Defendant fails, however, to allege what specific misrepresentations or omissions were purportedly made, who made them or when, or how she relied on them to her detriment. (Id.) Defendant has also failed to allege any specific basis for her purported reliance. (Id.) Because Defendant has failed to allege elements necessary to state a claim for fraud or misrepresentation with any particularity, this counterclaim should be dismissed. See F.R.C.P. 9(b); Tuchman, 14 F.3d at 1068; Guidry, 954 F.2d at 288.

b. Defendant's fraud claim appears to be nothing but a manufactured effort to undo Defendant's written admission of infringement to Plaintiffs.

In paragraph 42 of her Second Amended Answer, Defendant alleges that a Mr. William Pitzl, who works in a settlement call center contracted to handle settlement discussions for Plaintiffs, (1) represented that he was an attorney, (2) "falsely claimed that [Defendant] had downloaded music, infringed undisclosed copyrights, and owed [Plaintiffs] hundreds of thousands of dollars," (3) told Defendant that "the evidence necessary . . . to prevail in a lawsuit against [her] has already been obtained," and (4) advised Defendant to write an email admitting that she had deleted information from her computer. (Second Am. Answer ¶ 42.) To the extent that these allegations are made in connection with Defendant's counterclaim for fraud, which is by no means self-evident, these allegations still fail to support a viable claim of fraud.

During the course of settlement discussions, Defendant sent Plaintiffs an email saying that she had removed any programs that might allow online file sharing from her computer. (Second Am. Answer ¶ 42.)[3] Then, in an obvious effort to escape the potential legal effect of her admission, Defendant decided to accuse Mr. Pitzl of somehow tricking her into making the statement. (See id.) To the extent Defendant's fraud claim rests on her allegation that Mr. Pitzl

[3] Plaintiffs believe that this statement was false, because Defendant continued infringing Plaintiffs' copyrights after sending the email to Mr. Pitzl.

somehow tricked her into admitting infringement, such a claim is insufficient as a matter of law, because, at best, such a claim merely raises an evidentiary issue, namely, the admissibility or inadmissibility of Defendant's admission. If Defendant could prove her allegations against Mr. Pitzl—which she cannot—then the remedy would be to preclude Plaintiffs from offering Defendant's statement against her at trial.

Finally, to the extent that Defendant is relying on Mr. Pitzl's purported statements to support her claim for fraud, these allegations still fail, because Defendant cannot allege any damages associated with the alleged conduct. See In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001) (proof of damages required to establish fraud). The receipt of Defendant's written statement had nothing to do with Plaintiffs' decision to file their Complaint against Defendant because the statement was not received by Plaintiffs until after the Complaint had been filed. Thus, Defendant cannot claim this lawsuit as damages resulting from her admission. In addition, as noted above, as an evidentiary matter, Defendant's admission of improper downloading is either admissible or it is not. Either way, Defendant would have suffered no compensable damages. For these reasons, Defendant cannot establish a fraud claim based on Mr. Pitzl's purported actions.

c. Any claim based on purported statements during settlement discussions is barred by the Noerr-Pennington doctrine.

In addition to the foregoing, any purported fraud claim based on Mr. Pitzl's purported statements is barred by the Noerr-Pennington doctrine. As discussed above, Noerr-Pennington immunity extends to all aspects of the First Amendment right to petition. White, 227 F.3d at 1231 ("While the Noerr-Pennington doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts."); Video Int'l Prod., 858 F.2d at 1084 ("There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.").

It is not just the filing of a lawsuit that is protected behavior. Offers to settle a lawsuit constitute "conduct incidental to the prosecution of the suit" that are also protected under the Noerr-Pennington doctrine. Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1528 (9th Cir. 1991), aff'd 508 U.S. 49 (1993); see also Sosa v. DIRECTV, Inc., 437 F.3d 923, 2006 U.S. App. LEXIS 3541, at *29-*35, *46-47 (9th Cir. Feb. 15, 2006) (holding that settlement communications between private parties prior to litigation are protected activity, and that such protection extends to legal representations made during the course of such settlement communications). Even the mere threat of a lawsuit is protected by the Noerr-Pennington doctrine. Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (extending Noerr-Pennington immunity to generalized threats to litigate); Oneida Tribe of Indians of Wisconsin v. Harris, 2005 WL 2758038, at *3 (E.D. Wis. Oct. 24, 2005) (holding that the mere threat of a lawsuit is protected activity).

Here, as demonstrated from the face of Defendant's Second Amended Answer (Second Am. Answer ¶ 42), Mr. Pitzl's alleged statements were made during the course of settlement discussions. Thus, any claim based on such statements is barred by the Noerr-Pennington doctrine and should be dismissed.

7. Finally, Defendant's declaratory judgment action should be dismissed because it is redundant.

Defendant's final counterclaim seeks a declaratory judgment that Defendant did not infringe Plaintiffs' copyrights. (Second Am. Answer ¶ 52). This claim is redundant. A decision on the merits of Plaintiffs' copyright claim will render Defendant's request for declaratory judgment moot. This court should, therefore, dismiss Defendant's claim for declaratory relief because it is duplicative and unnecessary.

Courts routinely dismiss "mirror image" counterclaims where they merely restate issues already before the court as part of plaintiff's affirmative case. See, e.g., Aldens, Inc. v. Packel, 524 F.2d 38, 53 (3d Cir. 1975) (dismissing Attorney General's counterclaim for declaratory relief where counterclaim presented the "identical issues posited by the complaint"); Veltman v. Norton Simon, Inc., 425 F. Supp. 774, 776 (S.D.N.Y. 1977) (dismissing counterclaim for declaratory relief as "redundant" and "moot"); GNB Inc. v. Gould, Inc., 1190 WL 207429, *5 (N.D. Ill. 1990) (dismissing counterclaim as "duplicative" where it was "essentially a restatement" of plaintiff's claim from defendant's perspective).

Similarly, courts also will dismiss declaratory judgment counterclaims that are duplicative of defendant's own allegations in its defenses. See, e.g., Federal Deposit Ins. Corp. v. Bancinsure, Inc., 770 F. Supp. 496, 500 (D. Minn. 1991) (dismissing counterclaim that "seeks the same result as defendant's denials and affirmative defenses" as "redundant"); Lee v. Park Lane Togs, Inc., 81 F. Supp. 853, 854 (S.D.N.Y. 1948) (dismissing defendant's counterclaim seeking declaration of invalidity of trademark as unnecessary where allegations of counterclaim were already before court as a defense.)

Here, Defendant seeks a declaration that she has not infringed Plaintiffs' copyrights. (Second Am. Answer ¶ 52.) That precise issue of infringement is set forth in Plaintiffs' Complaint. Defendant's declaratory counterclaim raises no legal or factual issues outside those raised by Plaintiffs' Complaint, and is simply Plaintiff's copyright claim recast from the perspective of Defendant.

Defendant's declaratory judgment counterclaim is additionally duplicative of Defendant's answers and defenses in this case. Defendant's counterclaim alleges that Defendant "did nothing improper regarding Plaintiffs' copyrighted materials" and that Plaintiffs "do not own all of the copyrights which they allege Defendant has infringed." (Second Am. Answer ¶ 52.) The same denial of infringement is contained in paragraphs 13 and 22 of Defendant's Second Amended Answer. (Second Am. Answer ¶¶ 13, 15, 22.). If she successfully proves the allegations in her answer—that she did not perform any act that would give rise to infringement or that Plaintiffs are not the copyright owners—it would moot her counterclaim for a declaratory judgment of the identical proposition.

For these reasons, Defendant's counterclaim for declaratory relief is entirely redundant of Plaintiffs' claim and her own denials and defenses. Accordingly, the court should dismiss it.

CONCLUSION

For all of the above reasons, Plaintiffs ask this Court to strike Defendant's Second Amended Answer and Counterclaim or, in the alternative, to strike Defendant's affirmative defenses and to dismiss Defendant's counterclaims. Plaintiffs further request such other relief as the Court deems just and necessary.

Respectfully submitted,

Stacy R. Obenhaus
Attorney in Charge
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Dallas, Texas 75201
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ATTORNEYS IN CHARGE FOR PLAINTIFFS

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Houston, Texas 77002-5007
Tel: 713-276-5555

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFFS MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DEFENDANT'S SECOND AMENDED ANSWER AND COUNTERCLAIM OR, IN THE ALTERNATIVE, TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES AND DISMISS DEFENDANT'S COUNTERCLAIMS** was forwarded in accordance with the Federal Rules of Civil Procedure on this 4th day of April, 2006, via United States mail, as follows:

Ronald J. Shaw
The Shaw Law Firm, P.C.
7300 Blanco Road, Suite 610
San Antonio, Texas 78216

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ________
DATE FILED: 10/13/04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- x

CAROLINE RECORDS, INC., a New York corporation, et al.,

Plaintiffs,

-against-

DOES 1-100,

Defendants.

-- x

Civil Action No. 04 CV 6875 (SHS)

ORDER

Filed Electronically

Upon the plaintiffs' ex parte motion to revise the Court's order dated September 29, 2004 authorizing plaintiffs to ~~conduct immediate discovery~~ serve a Rule 45 subpoena on Time Warner Cable and upon all prior pleadings and proceedings herein, it is hereby:

ORDERED that plaintiffs' motion ~~be~~ is granted and that plaintiffs may serve immediate discovery on Time Warner Cable, Inc. by serving a Rule 45 subpoena to obtain the identity of each Doe Defendant by requesting the name, address, telephone number, e-mail address, and Media Access Control address for each Defendant. The disclosure of this information is ~~ordered~~ authorized pursuant to the Cable Communications Policy Act, 47 U.S.C. § 551(c)(2)(B);

IT IS FURTHER ORDERED THAT any information disclosed to Plaintiffs in response to the discovery request may be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights under the Copyright Act in connection with this litigation.

Dated: October 6, 2004

[signature]
United States District Judge

25369/000/648206.1

EXHIBIT
A

Tschirhart - 00101
RIAA.120575

Issued by the

United States District Court

SOUTHERN DISTRICT OF NEW YORK

CAROLINE RECORDS, INC.; ARISTA RECORDS, INC.; ATLANTIC RECORDING CORP.; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; FONOVISA, INC.; INTERSCOPE RECORDS; LONDON-SIRE RECORDS INC.; LOUD RECORDS, LLC; MAVERICK RECORDING CO.; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT INC.; and UMG RECORDINGS, INC.

SUBPOENA IN A CIVIL CASE

vs.

DOES 1 - 100

Case No. **04 CV 6875 (SHS)**

To: **Time Warner Cable**
290 Harbor Drive
Stamford, CT 06902

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case:

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **Information, including name, address, telephone number, e-mail address, and Media Access Control addresses, sufficient to identify the alleged infringers of copyrighted sound recordings, listed by IP address in Attachment A to this Subpoena.**

PLACE	DATE AND TIME
Cowan Liebowitz & Latman, P.C. **1133 Avenue of the Americas** **New York, NY 10036** **Phone: (212) 790-9200**	**November 19, 2004, 10:00 a.m.**

☐ YOU ARE COMMANDED to permit inspection of the following remises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Federal Rules of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (indicate if attorney for Plaintiff or Defendant)	DATE
Attorneys for Plaintiffs	

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
J. CHRISTOPHER JENSEN
Cowan Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036
Phone: (212) 790-9200

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

Attachment A

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Tschirhart - 00096
RIAA.120575

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Tschirhart - 00099
RIAA.120575

PROOF OF SERVICE

SERVED	Date	Place
served on (Print Name)		Manner of Service
served by (Print Name)		Title

DECLARATION OF SERVER

I Declare under penalty of perjury under the law of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________
Date

____
Signature of Server

____
Address of Server

____

Rule 45, Federal Rules of Civil Procedure, Parts C & D
(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fees.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure or privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim

****
*** TX REPORT ***
****

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TIME USE	01'44
PAGES SENT	4
RESULT	OK

sent to 310.231.8497

290 Harbor Drive
Stamford, CT 06902-7441
Tel 203-328-4844
Fax 203-328-4840
amanda.brown@twcable.com

Amanda M. Brown
Litigation Paralegal

TIME WARNER CABLE

November 19, 2004

VIA FACSIMILE 202-974-0555

Attorney Yvette Molinaro
Mitchell, Silberberg & Knupp
Trident Center
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683

Re: Caroline Records, et al v. Does 1-100; Case No. 04 CV 6875 SHS

Dear Yvette;

I am writing in response to the above-referenced subpoena seeking subscriber identifying information. Of the 100 IP Addresses requested, three are controlled by another entity, we need an extension of time for two, one is not a valid IP address, two we have information no information on and ninety-three we can respond immediately. Attached is a spreadsheet listing each IP address in the order in which they appear on the subpoena.

We understand that except for the IP address for which we need an extension, this satisfies our obligations under the subpoena. Please contact me at (203) 328-4844, if you have any questions.

Very truly yours,

Amanda M. Brown

Amanda M. Brown
Litigation Paralegal

cc: Craig Goldberg
Christine Dzujna

Tschirhart - 00165
RIAA.120575

290 Harbor Drive
Stamford, CT 06902-7441
Tel 203-328-4844
Fax 203-328-4840
amanda.brown@twcable.com

Amanda M. Brown
Litigation Paralegal

TIME WARNER CABLE

November 19, 2004

VIA FACSIMILE 202-974-0555

Attorney Yvette Molinaro
Mitchell, Silberberg & Knupp
Trident Center
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683

Re: ***Caroline Records, et al v. Does 1-100; Case No. 04 CV 6875 SHS***

Dear Yvette:

I am writing in response to the above-referenced subpoena seeking subscriber identifying information. Of the 100 IP Addresses requested, three are controlled by another entity, we need an extension of time for two, one is not a valid IP address, two we have information no information on and ninety-three we can respond immediately. Attached is a spreadsheet listing each IP address in the order in which they appear on the subpoena.

We understand that except for the IP address for which we need an extension, this satisfies our obligations under the subpoena. Please contact me at (203) 328-4844, if you have nay questions.

Very truly yours,

Amanda M. Brown

Amanda M. Brown
Litigation Paralegal

cc: Craig Goldberg
Christine Dzujna

IP Address	Name	Address	City, State and Zip Code
24.167.112.103	Delina Tschirhart	13801 Parksite Woods Street	San Antonio, TX 78249-1822